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No. 84-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS A & M UNIVERSITY, et al,

Appellants,

v.

GAY STUDENT SERVICES, et al,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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PRELIMINARY STATEMENT

The Fifth Circuit's ruling in this case requires Texas A & M University to give substantial financial support[1] and official recognition to a gay student group which will use those funds to advocate and further criminal acts. The Fifth Circuit held that the university's failure to give financial support to the gay student group violated the First Amendment. Texas A & M appeals this holding.

Firstly, the university admits homosexual students and has homosexual employees. The gay student group admits that it has been meeting regularly since 1976 without interference from the university. Appellee's Motion to Dismiss or Affirm at p. 4. Therefore, these students already have free exercise of all their First Amendment rights. The issue in this suit therefore is not

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[1] *See Gay Student Services* v. *Texas A & M University*, 737 F.2d 1317, 1319 n.3. (5th Cir. 1984)

whether the gay group has been denied its right to assembly and free speech. The issue is whether the university must give the gay group financial support.

Secondly, pure speech is not involved. The facilities and funds mandated by the Fifth Circuit can only be used in a context of speech brigaded with action, such as advocacy of illegal acts or recruitment of new students into gay activities. In view of the associated negative consequences to the welfare of the student body, this speech brigaded with action is not protected. (*See* cases cited, *infra*).

Thirdly, the university is justified in denying facilities and funds because homosexual conduct is a criminal offense in Texas. The university cannot be required under the Constitution to subsidize an organization whose members admittedly violate state law. The university also has a compelling interest in protecting its student body from the physical, psychological and disease ramifications of increased homosexual activity likely to be furthered by financial support to this group. (*See* amicus brief below of Dallas Doctors Against AIDS for discussion of disease impact of homosexual activity which includes but is not limited to acquired immune deficiency syndrome).

Fourthly, no forum has ever been created for fraternal-type organizations by Texas A & M University. Texas A & M has never financially supported fraternal-type organizations. The gay student group is a fraternal-type organization. Thus, the gay group has received equal treatment as similarly situated student organizations.

Appellants submit that they are entitled to an appeal of right in this case pursuant to the provisions of 28 U.S.C. § 1254(2) (reliance on invalid state statute). Appellants alternatively submit that they are entitled to an appeal by writ of certiorari in this case on two grounds, pursuant to the provisions of Supreme Court Rules 17.1(a) (conflict between the circuits) and 17.1(c) (important question of federal law).

I.

Appellants Are Entitled To An Appeal Of Right Pursuant To The Provisions Of 28 U.S.C. § 1254(2)

28 U.S.C. § 1254(2) provides for appeal to the Supreme Court of the United States "[b]y appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." As explained below, this case draws into question the constitutional validity of two state statutes: (1) Texas Penal Code Ann. § 21.06 (Vernon 1974); and (2) the Texas A & M University Rules and Regulations. The Texas A & M University Rules and Regulations, which are promulgated pursuant to the authority of the Texas A & M Board of Regents,[2] qualify as a "state statute" for purposes of 28 U.S.C. § 1254(2) under the holding of *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934).

Texas A & M University originally refused to recognize the gay student group for two reasons. Firstly, the group's purposes and goals are contrary to Texas A & M University regulations of 1975-76, which stated, "[s]tudent organizations may be officially recognized when formed for purposes which are consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University." Secondly, homosexual conduct is illegal in Texas, under Texas Penal Code Ann. § 21.06 (Vernon 1974). The university stated that it is inappropriate "for a state institution officially to support a student organization which is likely to incite, promote, and result in acts contrary to and in violation of the Penal Code of the State of Texas." 737 F.2d at 1320 n.4. Furthermore, the Board of Regents passed this resolution with regard to the gay student group:

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[2] This authority is granted to the Regents pursuant to Tex. Educ. Code Ann. § 85.21(a) (Vernon Supp. 1984).

> So-called "gay" activities run diabolically [sic — diametrically?] counter to the traditions and standards of Texas A & M University, and the Board of Regents is determined to defend the suit filed against it by three students seeking "gay" recognition and, if necessary, to proceed in every legal way to prohibit any group with such goals from organizing or operating on this or any other campus for which this Board is responsible.

737 F.2d at 1322. The Fifth Circuit found the Board of Regents' reasons for refusal of financial support and recognition to be unconstitutional.

Appellees attack Appellants' reliance on 28 U.S.C. § 1254(2), arguing that the denial of recognition was not a decision made by the Board of Regents; rather it was a decision made by a single administrator. Based on that argument, Appellees contend that this case is not within the ambit of the holding of this Court in *Hamilton* v. *Regents of the University of California, supra.*

This argument is inconsistent with the facts as stated by the Fifth Circuit as its reasons for its opinion, which focused on the policies and rules of the Board of Regents. It has never been questioned that the university's refusal to subsidize the gay group was pursuant to the rules, policies, and expressed intent of the Board of Regents.

Appellees also seek to bolster their argument by contending that § 1254(2) is to be strictly construed. In support of this proposition they assert only two cases. Appellee's first case is *Perry Education Association* v. *Perry Local Educators' Association,* 460 U.S. 37, 43 (1983). *Perry* does not apply to this case because it did not involve any type of "legislative action" (such as a rule or decision made by the Board of Regents). *Perry* merely held that a *collective bargaining contract* between a union and a school district was not a state statute.

Appellee's second case is *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 42 n.1 (1970). In *Fornaris,* this Court dismissed an appeal as improper because a statute of Puerto Rico was

reasoned by this Court not to be a state statute under § 1254(2) *because Puerto Rico was not a state.* Appellants agree that this case would be applicable in this case if, and only if, Texas were not a state.

II.

Appellants Are Entitled To Appeal By Writ Of Certiorari Because Of A Conflict In The Circuits

Rule 17.1(a) indicates that one factor governing review on certiorari is a conflict in holdings on the same issue between circuits. An important issue in this case is whether a state university can constitutionally regulate speech advocating illegal homosexual conduct and speech likely to incite such conduct.[3] As shown herein, the First, Fourth, D.C., and Tenth Circuits conflict with the Fifth Circuit's position in this case.

The Fifth Circuit places great reliance in its holding upon *Gay Students Organization* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974). The *Bonner* court stated, however that a university "is by no means bereft of power to regulate conduct on campus. Not only may [the university] act to prevent criminal conduct by policies focused on real and established dangers, *but it can proscribe advocacy of illegal activities falling short of conduct, or conduct in itself noncriminal, if such advocacy or conduct is directed at producing or is likely to incite imminent lawless action.*" 509 F.2d at 662, citing *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969) (emphasis added).

Another case heavily relied upon by the Fifth Circuit is *Gay Alliance of Students* v. *Matthews*, 544 F.2d 162 (4th Cir. 1976). The *Gay Alliance* court stated that "[i]f, on the other hand, VCU's [Virginia Commonwealth University's] concern is with the possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. *We have*

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[3] Actually the case *sub judice* goes a step beyond this. Here the Fifth Circuit has actually ordered the university to provide financial support to further such speech.

little doubt that the University could constitutionally regulate such conduct." 544 F.2d at 166, citing *Doe* v. *Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976) (emphasis added).

The Fifth Circuit's holding conflicts with the D.C. Circuit's holding in *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), in which the D.C. Circuit held that homosexual conduct is not constitutionally protected by any right in the Bill of Rights. *Dronenburg* held that the Supreme Court has never defined the right of privacy so broadly as to encompass homosexual conduct, citing *Poe* v. *Ullman*, 367 U.S. 497 (1961), (Harlan, J. dissenting), and citing the Supreme Court's summary affirmance in *Doe* v. *Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976), of the district court judgment, 403 F. Supp. 1199 (E.D. Va. 1975), upholding a Virginia statute making it a criminal offense to engage in private homosexual conduct. 741 F.2d at 1391.

Yet another case in conflict with the Fifth Circuit is *Board of Education* v. *National Gay Task Force*, 729 F.2d 1270 (10th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 2, 1984) No. 83-2030. *National Gay Task Force* also holds that homosexual conduct is not constitutionally protected under the First Amendment. Therefore, the First, Fourth, D.C., and Tenth Circuit Courts of Appeals have all ruled on this issue in conflict with the Fifth Circuit's decision.

In Rule 17.1(a) the Court has also stated that it will consider granting certiorari if the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. In this regard, Appellants would respectfully refer this Court to the third and fourth questions presented in Appellant's Jurisdictional Statement at pages 16-20 (procedural errors regarding trial court's findings of fact).

III.

Appellants Are Entitled to Appeal By Writ of Certiorari Because Of An Important Question Of Federal Law

Rule 17.1(c) indicates that the presence of an important question of federal law will be considered in deciding whether to grant an appeal on writ of certiorari. The issue of an educational institution's right to regulate speech or conduct advocating or inciting illegal homosexual activity has been addressed by at least six circuits yet conflictingly resolved. The Supreme Court, however, has never yet addressed this important issue of federal law.

This Court has recently granted certiorari, however, in *Board of Education* v. *National Gay Task Force*, 729 F.2d 1270 (10th Cir. 1984), *cert. granted* 53 U.S.L.W. 32, 35 (U.S. October 2, 1984) No. 83-2030. *National Gay Task Force* addresses the same important issue of federal law presented by the case *sub judice*. Appellants request that this case be consolidated with *National Gay Task Force* or be separately entertained on appeal because of this important issue of federal law.

IV.

Decision Not Correct On Law Or Facts

Lastly, at pages 16 through 20, counsel for Appellees states that the decision below should be affirmed because it is correct on the law and is correct on the facts. In this regard, please see the discussion in the Jurisdictional Statement previously filed in this Court at pages 10-13, showing that the court was not correct on the law, and the discussion at pages 16-19 showing that the Fifth Circuit was not correct on the facts.

V.

Conclusion

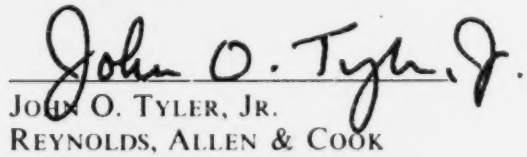
The homosexual community, by its very nature, relies upon the recruitment of *new members* for the continuation of its very existence. As shown by the expert testimony presented by Texas

A & M University at this trial, a significant percentage of initial homosexual experiences occur while the individual is of college age. (Testimony of Dr. Paul Cameron at pp. 110 and following). Texas A & M University has the right to protect students from the inevitable negative societal side effects of homosexual conduct, particularly when such conduct remains illegal under the criminal laws.

The decision of the Fifth Circuit in this case requires the expenditure of state funds to further the goals of the gay student group. The group admits that it will advocate homosexual conduct. It is naive and misleading of Appellees to argue increased homosexual activity will not be advocated or incited by this gay student group; or that they only seek to exercise their First Amendment Rights and they do not intend to engage in recruitment of new members into the homosexual community.

What other purpose could there be for this suit? Appellees admit at page 4 of their own brief that this group has met continuously since 1976. The group already has free exercise of its First Amendment rights. What they really seek in this suit, therefore, is forced expenditure of state funds to further their advocacy and commitment of criminal acts. Appellants respectfully submit that this Honorable Court, on all the grounds previously stated, has jurisdiction in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Motion to Dismiss or Affirm has been furnished to all counsel of record listed below by placing the same in the United States mail, certified, return receipt requested, this 11th day of January, 1985, in accordance with Supt. Ct. R. 28.

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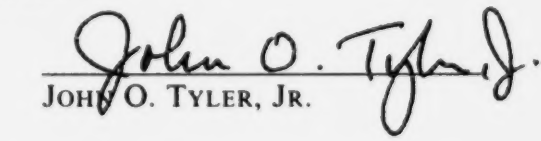

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